DELRS
Defense Employee and Labor Relations Symposium

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KEYS TO NEGOTIATING A BETTER COLLECTIVE BARGAINING AGREEMENT

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Learning Objectives

- To understand the impact of contract language
- Problematic language to avoid
- To better understand what's negotiable
- How to reduce litigation

How Important is Contract Language?

- Unclear language can cause differences in interpretation and can result in a “past practice”
- Lack of understanding of the language could result in ULP – repudiation
- Lack of understanding can put a strain on the relationship between parties
- Becomes crucial in determining the outcome of many arbitrations
- More litigation

Knowing Your Contract

- Understand what the language means
- How is it intended to operate
- Is the language needed?
- Does it address relevant/current issues?
- How can we make it better?

Problem Language

- What is the plain meaning of the language?
- Is it clear?
- How does this language work and what are the problems with compliance?
- What was/is the language intended to do?
- Is the language vague/general?
- Do we need to take it out? Or reword it?

Contract language & Arbitration Awards

- Arbitrators no longer need to reconstruct what management would have done had the contract not been violated
  - Remedy need only be reasonably related to provision and harm being cured

    65 FLRA No. 27 - FDIC, Division of Supervision and Consumer Protection and NTEU, September 29, 2010
- Excessive Interference a thing of the past…
  - To the extent the Arbitrator finds that the provision was intended as an appropriate arrangement or a procedure, the award does not fail on an excessive interference argument, must abrogate management's right

    65 FLRA No. 28 - Environmental Protection Agency and AFGE Council 238, September 29, 2010

The Essence Standard

(An Arbitrator's Interpretation of Contract Language)

- In order to show that the award fails to draw its essence from the CBA, you must prove that the award:
  - Cannot in any rational way be derived from the agreement
  - Is so unfounded in reason and fact and so unconnected with the wording and purposes of the contract as to manifest an infidelity to the obligation of the arbitrator
  - Does not represent a plausible interpretation of the agreement
  - Evidences a manifest disregard of the contract

The Importance of Language – Example 1

Article 21, Section 6.C:

"At least once during the appraisal period, management will have a documented performance discussion with each employee regarding the employee's performance. During the discussion, management should discuss the employee's contributions and results achieved … reinforce expectations, and identify needs for performance management.

….

Managers should document the content of performance discussions … Employees and supervisors will sign the performance plan to acknowledge that the [mid-year] discussion was held."

65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example1 (continued)

GRIEVANCE:

- Agency violated Article 21 when more than one management official participated in mid-year performance discussions with individual employees.

65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example1 (continued)

DECISION:

- The Arbitrator sustained the grievance and directed the Agency to conduct future mid-year discussions with only one management official participating.

65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example 1 (continued)

Arbitrator's Interpretation:

- The language is ambiguous - contained both singular and plural forms of manager(s), supervisor(s) and management, which made the language inconsistent as to how the terms were to be used
- She considered the past practice
- Agency violated the agreement by having two supervisors present for performance discussion
- Agency maintains discretion as to who would perform performance discussions

65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example 1 (continued)

AGENCY'S EXCEPTION ARGUMENTS:

- Award is contrary to management's right to assign work (5 USC § 7106(a)(2)(B))
- Award does not draw its essence from the collective bargaining agreement

UNION'S OPPOSITION ARGUMENT:

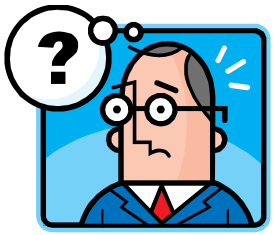
- Article 21, Section 6.C constitutes a procedure under 5 USC § 7106(b)(2)

65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example 1 (continued)

THE AUTHORITY'S DECISION:

- The language affects the right to assign work
- However, does not abrogate management's right – management retains right to determine who, but must only have one
- The language is a negotiable procedure
- The award draws its essence from the CBA



65 FLRA No. 137 – SSA and AFGE Council 220, March 25, 2011

The Importance of Language – Example 2

"Overtime will be distributed as equitably as possible among qualified employees."

65 FLRA No. 102 – Dept of Treasury, IRS and NTEU Chapter 72, January 31, 2011

- Affect on management's right to assign work?
  1. No affect, common language found in many agreements
  2. Excessive interference
  3. Abrogation of management right

The Importance of Language – Example 2 (continued)

- Arbitrator's finding
  - Management violated the contract by limiting overtime to AWS days off and Saturdays
  - Unfair advantage to AWS employees
  - Non-AWS employees not assigned overtime on an "equitable" basis
  - Ordered overtime pay for non-AWS employees

65 FLRA No. 102 – Dept of Treasury, IRS and NTEU Chapter 72, January 31, 2011

The Importance of Language – Example 2 (continued)

- FLRA Decision:
  - FLRA upheld arbitration award
  - Award does not abrogate management's right to assign work
  - Management required to assign overtime "as equitably as possible" so as not to advantage one group of employees over another – no longer restrict overtime to Saturdays and non-AWS days

65 FLRA No. 102 – Dept of Treasury, IRS and NTEU Chapter 72, January 31, 2011

Common Mistakes

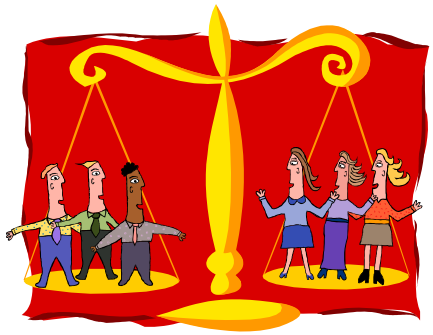
- Not checking the law, government-wide regulations
  - Examples:
    - Rewording Management's Rights (5 USC 7106)
    - Family Friendly Leave Act
    - Medical documentation (5 CFR § 630.405)
    - Definition of family member for sick leave purposes
    - Changing hours of work (5 CFR § 610.121)
- Incorporating component/activity regulations into the contract
  - Becomes a part of the contract
  - Is susceptible to an arbitrator's interpretation

A Union Proposal - Exercise

Prior to issuing a letter of reprimand or a notice of disciplinary action, the Agency shall undertake a fair and objective investigation to obtain pertinent facts relating to the situation. The inquiry may include a discussion with the affected employee and careful consideration of any of the employee's comments. Any and all documents used in connection with or generated by that investigation will be given to the employee and the Union. If an AR15-6 investigation (or similar investigation) is conducted on any incident the Agency will include a member of the Union's Executive Board who is not in the same district as the incident, on the investigation team. The time spent by this person will not be counted against the Union's official time bank and all travel and per diem will be covered by the Agency.

All is Fair in Labor Relations!
(Exercise)

The Employer agrees to ensure that the Employer is responsible and accountable for its decisions. All decisions will be made on a fair and equitable basis.



How's Your I/I?
(Exercise)

Appropriate Matters for Impact & Implementation Bargaining

In accordance with Public Law 95-454 the Labor Organization will be afforded its right to impact & implementation (I&I) on any conditions of employment, to include personnel policies and practices and matters affecting working conditions.

Meetings

a. Upon notification by management, the Labor organization and confer as soon as practicable, date and time will be by mutual consent. All meetings will take place during normal duty hours.

b. The Employer and the labor organization agree to render decisions on issues not resolved at the meetings, within (10) working days unless it is mutually agreed otherwise.

c. Consistent with the above, and with the authority to do so, the Employer agrees not to make changes in personnel policies, practices and working conditions, without prior negotiations/negotiations/consultations with the Labor organization.

Overtime! (Exercise)

Section 7. The assignment of overtime, whether scheduled or unscheduled, is a function of the Employer. Overtime assignments will be distributed in an objective manner among qualified Bargaining Unit Employees consistent with workload requirements taking into consideration skill, ability, performance, dependability, and the desires of Employees to the extent practicable. Overtime will not be assigned as a reward or a penalty, but solely in accordance with the needs of the Employer. In assigning overtime, the Employer agrees to exhaust the pool of available qualified Bargaining Unit Employees before assigning the overtime to supervisors, military personnel, or contractors.

Questions